JD–07--05
Philadelphia, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BOARDWALK REGENCY CORP.
d/b/a CAESARS ATLANTIC CITY

and Case 4—CA—32937

DAVID J. LOMANTO,
an Individual

Peter C. Verrochi, Esq., for the General Counsel.
Michael Barabander, Esq., Peter B. Ajalat, Esq.,
and *Margo Eberlein, Esq.,* of Roseland,
New Jersey, for the Respondent.
David J. LoManto, of Little Egg Harbor, New Jersey,
Charging Party.

DECISION

Statement of the Case

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Philadelphia, Pennsylvania, on December 6-8, 2004.[1] The initial charge was filed March 25, and an amended charge followed on May 20. The complaint and notice of hearing was issued May 25.[2]

The General Counsel alleges that the Company, through statements of its supervisors, violated Section 8(a)(1) of the Act by indicating that it would be futile for employees to select union representation, threatening reprisals for engaging in union activities, and creating an impression that union activities were under surveillance by management. In addition, the General Counsel asserts that the Company issued its employee, David J. LoManto, a written warning, followed by a suspension, and, ultimately, a discharge. It is contended that these sanctions were imposed in order to discourage union activities in violation of Section 8(a)(1) and (3) of the Act. The Company filed an answer to the complaint, denying all of the material allegations. As described in detail in the decision that follows, I conclude that the General

[1] All dates are in 2004 unless otherwise indicated.

[2] At the conclusion of the trial, both counsel requested that I hold the record open to receive additional documentary evidence and stipulations. I agreed. These items having been received, on January 11, 2005, I issued an order closing the record.

Counsel failed to meet his burden of demonstrating that the Company violated the Act in any of the ways alleged in the complaint.

On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Party, and the Company, I make the following

Findings of Fact

I. Jurisdiction

The Company, a corporation, operates a hotel and casino at its facility in Atlantic City, New Jersey, where it annually receives gross revenues in excess of $500,000 and purchases and receives goods valued in excess of $5000 directly from points outside the State of New Jersey. The Company admits[4] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Introduction

The Company's hotel and casino in Atlantic City is a large facility. It employs more than 3000 persons. Of those, approximately 800 are dealers responsible for the operation of the casino's games of chance. The dealers are not represented by a labor organization. For the past decade, Teamsters Union Local 331, a/w International Brotherhood of Teamsters, AFL-CIO, has represented some of the Company's other casino employees.

In late November or early December 2003, the Union began an organizing campaign among casino dealers employed by several casinos in Atlantic City, including Caesars. The president of Local 331, Joseph Yeoman, testified that this drive "really took off" in January 2004. (Tr. 286.) At that point, public meetings were held several times each week. This continued until March. Yeoman indicated that the Union obtained authorization cards signed by approximately 200 dealers at Caesars. Nevertheless, the organizing campaign terminated without the filing of an election petition.

Among those who became involved in the organizing effort was LoManto. The

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[3] Counsel for the General Counsel filed a motion to correct the transcript of these proceedings. It is unopposed, and I grant it with the following corrections and notation. Counsel's reference to p. 284, l. 12, should be to p. 285, l. 12. I cannot find the phrase counsel refers to as being at p. 302, l. 14. The citation to p. 555, l. 1, should be to p. 556, l. 1. The reference on p. 676, l. 77, is to p. 676, l. 17. I also note these additional corrections. At p. 12, l. 4, the speaker is counsel for the General Counsel, not counsel for the Company. At p. 426, l. 3, "first" should be "fist." At p. 431, l. 10, I actually said, "you stand <u>or</u> fall by that." Any remaining errors of transcription are not significant or material.

[4] See, answer to complaint, pars. 4 and 5. (GC Exh. 1(g).) The complaint originally named the Respondent as Park Place Entertainment Corporation t/a Caesar's Atlantic City. (GC Exh. 1(e).) Based on the Company's representations regarding the proper corporate name, I granted counsel for the General Counsel's request to amend the complaint to change the Respondent's name to Boardwalk Regency Corp., d/b/a Caesars Atlantic City. (Tr. 7-8.) The Company does not use an apostrophe in the casino's name.

Company had hired him as a dealer on June 1, 1999. He had previous experience as a dealer at the Tropicana Casino from 1989 to 1998. LoManto testified that he first spoke with Yeoman and another union officer in late November or early December 2003.[5] On December 15, a coworker gave LoManto an authorization card that he signed and mailed to the Union. (GC Exh. 15.) He testified that he also began attending union meetings and distributing union literature to coworkers during this period.

The Company drafted a written warning notice to LoManto on March 2, 2004. This was issued to him on March 5. On that date, he was also placed on an investigatory suspension that led to his discharge on March 11. As a result, the focus of attention must be directed to the conduct of the parties between the initiation of organizing activity and the discharge of LoManto.

B. Preliminary Discussion of Credibility

As mentioned, the Company employs a sizeable complement of casino dealers, numbering approximately 800. The Union's organizing effort among those employees extended over a period of more than 4 months. It garnered significant support demonstrated by the fact that one-fourth of the dealers signed cards authorizing Local 331 to "represent me in negotiations for better wages, hours and working conditions." (GC Exh. 17.)

The General Counsel asserts that, on three occasions during the course of these events, the Company's supervisors committed violations of Section 8(a)(1) of the Act. In addition, it is contended that the Company imposed various disciplinary steps, including termination of employment, on one of its dealers, LoManto. After examining the evidence offered in support of these allegations, one fact emerges as particularly striking. Despite the participation of many individuals in the organizing campaign involving this substantial group of employees, the only witness to offer evidence as to each and every one of these allegations was LoManto. No other employee or union official testified in support of his assertions.[6] While LoManto alleges that several of the key incidents involved unwitnessed conversations between himself and a supervisor, he also asserts that other employees were present when a supervisor allegedly committed the unfair labor practice of informing the group of dealers that they "were cowards and that [t]he Union would never get in." (Tr. 54.) This allegation, like all of the others, was unsupported by any corroborative evidence.

LoManto's version of events is essentially the entire corpus of the General Counsel's evidence. As a result, consideration of the credibility of his testimony becomes a central feature of this case. I have made a careful evaluation of the reliability of his accounts, both as they stand alone and when they are weighed in juxtaposition to the contrary accounts of numerous witnesses called by the Company. Viewed from both perspectives, I find LoManto's veracity to be lacking.

Turning first to the weight to be accorded to LoManto's assertions when viewed standing alone, I note that he was singularly unimpressive as a witness. His presentation was marked by a virtual compulsion to engage in self-justification, coupled with an inability to acknowledge any

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[5] Yeoman testified that he believed that he was first contacted by LoManto, "somewhere in the latter part of December, middle or latter part of December." (Tr. 287.)

[6] Local 331's president, Yeoman, did testify. His account was limited to the nature of the organizing campaign and LoManto's activities in support of that campaign. He did not testify regarding any alleged unfair labor practices by the employer or regarding any other indicia of animus or opposition to the campaign by management of the casino.

legitimacy regarding contrary viewpoints. When confronted during cross-examination by facts that tended to undercut his self-serving testimony on direct examination, he repeatedly shifted his story, offering different versions designed to meet the unvarying objective of completely justifying all of his actions.[7] I will provide additional descriptions of my perceptions regarding his credibility during the detailed analysis that follows. However, it is useful to now describe a clear example involving a collateral issue that serves as a pertinent illustration of the overall situation.

As part of its defense in this case, the Company raised the issue of newly discovered allegedly false statements made by LoManto in his original job application. Evidence was presented on this point with the objective of limiting any potential backpay remedy and eliminating the possibility of an order for reinstatement.[8] *John Cuneo, Inc.,* 298 NLRB 856 (1990). See also, *McKennon v. Nashville Banner Pub. Co.,* 513 US 352, 362-363 (1995). The Company contended that, despite being warned on the job application form that "[a]ny misrepresentation or omission of facts" would be grounds for denial of employment or termination, LoManto made at least two highly material incorrect statements when completing the form. (R Exh. 1, p. 4.) He was asked if he had "ever been convicted of a crime (other than traffic violation)." He checked the box indicating that his answer was, "no." (R. Exh. 1, p. 2.) The evidence demonstrated that, in reality, he had been convicted of harassment in 1987, arising out of a dispute involving his ex-landlord.

LoManto was also asked the "[r]eason for [l]eaving" his prior employment as a dealer at the Tropicana. The form provided the applicant with three boxes to mark in response, one indicating resignation, one for termination, and a final one indicating a layoff. On LoManto's form, the box indicating resignation has a check mark near the box and extending through the printed word, "Resigned." The box for termination is checked.[9] Regardless of which box is checked, the form seeks an additional written explanation. LoManto's statement was that his reason for departing from the Tropicana was: "Seeking better employment. Advancement opportunity." (R. Exh. 1, p. 2.)

On cross-examination, counsel for the Company probed LoManto's reasoning regarding the manner in which he had prepared his application form. LoManto denied making the check mark through the word, "Resigned." He asserted that there was nothing misleading about his explanation for leaving the Tropicana. Counsel then asked him if he was terminated by the Tropicana due to "guest complaint issues." (Tr. 202.) LoManto responded, "I'm not at liberty to

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[7] Taking note of LoManto's pattern of shifting his story in response to questioning, counsel for the Company observe that LoManto "makes up the story as he goes along based on what is most beneficial to him at the time." (R. Br. at p. 24.)

[8] Given my conclusion that the General Counsel failed to meet his evidentiary burden as to the commission of any unfair labor practices, the merits of this partial defense are not reached.

[9] This practice of creating ambiguity by marking more than one possible answer on the application form was also apparently used by LoManto in the section of the form regarding his educational history. When asked to circle the highest grade he completed, LoManto circled both the 11th and 12th grade options. (His explanation for this was unpersuasive. See, tr. 213.) Interestingly, he appears to have engaged in the same behavior when completing his job application form at the Tropicana many years earlier. That form also asked whether he had any history of criminal convictions. It provided boxes for affirmative and negative responses. LoManto's application shows a check mark in the affirmative box and an "x" in the negative box. Similarly, the Tropicana application asks whether the applicant has any health problems that could adversely affect employment. LoManto's form has an "x" in the box indicating a negative response and a vertical line in the box indicating a positive response. (R. Exh. 4.)

say." (Tr. 203.) He reported that his refusal to respond was due to the fact that he had a pending lawsuit against the Tropicana for "wrongful dismissal." (Tr. 203.) I directed LoManto to answer counsel's question. In response, he stated, "I plead the fifth on that." (Tr. 203.) I inquired whether LoManto believed that his response could tend to incriminate him. He responded that he did not believe this. Instead, he now asserted that he had been, "[s]worn to secrecy" regarding his termination from employment at the Tropicana. (Tr. 206.) At this point, I recessed the proceedings so that counsel for the General Counsel could confer with LoManto.

When proceedings resumed, LoManto again asserted that he had been sworn to secrecy and, in addition, he expressed the view that, by answering the question, he would be incriminating himself. I then questioned him regarding the precise meaning of his having been sworn to secrecy. It turned out that his attorney in his wrongful dismissal lawsuit had simply instructed him not to discuss the case. I again probed whether he believed that his response could be self-incriminating and he stated, "[p]ossibly." (Tr. 210.) I noted that counsel for the Company could request a variety of sanctions for refusal to answer, including the drawing of an adverse inference.[10] At that point, LoManto finally answered the question, stating that the reason given for his termination from the Tropicana was due to "a customer complaint." (Tr. 212.)

Counsel for the Company then turned his attention to LoManto's response to the question regarding any criminal history. LoManto confirmed that he checked the box indicating that he had no such criminal history. Counsel asked if that statement was true. LoManto responded, "Sure it's true."[11] (Tr. 213.) Counsel followed up by asking if he was convicted of the crime of harassment in 1989. LoManto's perplexing response was: "I don't recall. No." (Tr. 213.) Counsel then remarked on the oddity of someone being unable to recall whether they had been convicted of a crime and asked if LoManto's recollection could be refreshed. He showed LoManto his application at the Tropicana.[12] LoManto indicated that his recollection was now refreshed. In fact, he now noted that, "I am very familiar with that case." (Tr. 215.) Indeed, he went on to report that he had a

> clear recollection, and I lived at 6 Barbara Avenue in West Orange. I can tell you the phone number too. It's a complete recollection.

(Tr. 218.)

At this juncture, LoManto shifted from his original position that he did not recall anything that rendered his negative response on the application erroneous. He now asserted that, "I was

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[10] I also asked counsel for the General Counsel whether it appeared to him that there was any issue of self-incrimination. He responded, "No, I don't think he's under any criminal jeopardy." (Tr. 211.)

[11] This is a clear example of prevarication. LoManto later admitted that he was "found guilty of harassment" by the municipal court of Westland, New Jersey. (Tr. 267.) He described the case as a misdemeanor involving "a fourth degree offense of disorderly persons for harassment." (Tr. 268.) Given the specificity of LoManto's testimony on this point, I reject counsel for the General Counsel's argument that the evidence failed to establish that LoManto understood that he had been convicted of a crime. (See, GC Br. at p. 48.)

[12] In the Tropicana application, LoManto filled in the boxes regarding criminal history in the ambiguous fashion previously described. In the space provided for explanations regarding convictions, he wrote, "'87 Harassment—ex-landlord West Orange." (R. Exh. 4, p. 1.)

actually told by the Casino Control Commission that I could put no." (Tr. 215.) When pressed as to why the Commission would give him such permission, he provided the following justification:

> They said you don't have to put that because it was a discrepancy with an ex-landlord. You weren't convicted in the sense where you were arrested. It was a misdemeanor kind of thing in the fourth degree I believe they called it.

(Tr. 216-217.)

Counsel pursued the issue, noting that his question did not refer to LoManto's duty to respond to the Casino Control Commission, but rather his obligation to provide accurate information to Caesars. At that point, LoManto's account again shifted. He now contended that an employee of Caesars named Rich told him, "you could put no." (Tr. 218.) Later in his testimony, he amplified this, explaining that he told Rich that the Commission had advised him, "that things can't be held 10 years, they don't really go back 10 years." (Tr. 270.) Shortly thereafter, he shifted his explanation yet again, observing that, "they could go back that far, but for a misdemeanor there's no big deal." (Tr. 271.)

I have recounted this episode from the trial in some detail because it illustrates the principal difficulty with LoManto's uncorroborated accounts.[13] Whether through calculated design or simply through inability to comprehend other persons' viewpoints or to gain insight into his own conduct, LoManto habitually tailored his testimony to justify his behavior. When presented with information that would tend to undercut his statements, he would blithely shift gears, presenting an entirely new version that nevertheless continued to offer a complete justification for his behavior. In listening to and observing his testimony during trial and, afterwards, in examining his testimony in context with all of the other testimony and documentary evidence, I became convinced that LoManto's uncorroborated statements could not be deemed reliable and credible.

By contrast with the General Counsel's reliance on the accounts of a sole witness, the Company presented testimony from virtually every supervisory official involved in the matters in controversy.[14] Those witnesses included Linda Krasowski, LoManto's immediate supervisor at the time of the key February 21 and March 5 incidents; Derek Solomon, the pit boss who supervised both LoManto and Krasowski on March 5; Ian Nebbett, the shift manager who suspended LoManto; Paul Natello, the casino manager who participated in the decisions to warn and terminate LoManto; Patricia Fineran, the Director of Labor Relations, who also participated in those decisions; Rosemary Evans, Director of Casino Administration, the third

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[13] My primary concern arising from the issue of LoManto's statements on his application is the manner in which he chose to testify about it at trial. His behavior at the time that he applied for work at Caesars is secondary. See, *Double D Construction Group, Inc.*, 339 NLRB 303, 306 (2003), where the Board held that the fact that a witness was untruthful in the past, standing alone, is insufficient reason to discredit his testimony. Instead, the judge must consider all factors bearing on credibility as of the time of the testimony.

[14] The only exception was Joseph Pilleggi, LoManto's pit manager during the incident on February 21. Pilleggi is no longer employed by the Company. Although he was not offered as a witness, the Charging Party introduced Pilleggi's written report concerning that incident. (C.P. Exh. 4.) That statement was consistent with the testimony of other management witnesses regarding those events.

decision maker regarding LoManto's discipline; and Frank Niceta, Vice President of Casino Operations, who was alleged by LoManto to have made threats of reprisal and predictions of the futility of organizing. Beyond this, the Company presented the testimony of William Ossakow, D.D.S., one of the casino customers who made complaints against LoManto on February 21.

Beyond observing that the Company's presentation was comprehensive, I was struck by the clarity and consistency of the testimony by its witnesses. None of the managers displayed any anger or malice against LoManto or the Union. To a person, they came across as dispassionate and balanced in their assessments of the events under consideration. This was equally true on direct examination and when cross-examined by both counsel for the General Counsel and LoManto himself, acting in his role as Charging Party. Furthermore, the parties introduced a complete paper trail documenting the Company's behavior, including contemporaneous incident reports prepared by customers and managers alike. These reports were consistent with the version of events recounted in the testimony of the Company's witnesses.

The background of many of the Company's management witnesses also impressed me. Far from being impractical ivory tower observers of the events in the gambling pits, many of them had extensive histories in gaming operations and customer relations on the casino floor. For example, Krasowski had 18 years experience as a dealer at Caesars and elsewhere. Solomon served for more than two decades as a pit boss and had additional experience as a floor person. Nebbett began his career as a dealer and served in all intermediate positions before rising to shift manager. Even the Director of Casino Administration, Evans, and the Vice President of Casino Operations, Niceta, began their careers as dealers. The managers' extensive practical experience at the operational level enhanced the credibility of their accounts of their thought process regarding LoManto's discipline.

In sum, this case presented a clear contrast between the uncorroborated testimony of an unreliable complainant and the consistent and persuasive contrary accounts of numerous management witnesses, accounts supported by the documentary evidence and by the testimony of one of the customers who played a central role in a critical incident. Given the qualitative and quantitative paucity of evidence in support of the General Counsel's case compared to the detailed and consistent accounts by credible witnesses on behalf of the employer, I have no difficulty in concluding that the General Counsel failed to meet his evidentiary burdens.[15] I will now turn to the specific events that underlie this controversy.

C. The Facts at Issue

In the final months of 2003, the Union began its organizing campaign among dealers employed by various casinos in Atlantic City. LoManto signed an authorization card in the

[15] Of course, I base my conclusions on a particularized assessment. The Company's quantitative edge, standing alone, would be relatively meaningless. For example, in *Overnite Transportation Co.,* 336 NLRB 387, 392 (2001), the Board affirmed an administrative law judge's rejection of a company's argument that the testimony of its four witnesses must prevail over the contrary testimony of a lone witness for the General Counsel. The judge characterized such an argument as "fatuous," and I agree. In that case, the judge found the sole witness to be highly credible and the company's evidence to be tainted by a pervasive history of unfair labor practices and unlawful animus. In the case under consideration, it is the sole witness who is found to be unreliable, while the testimony of the numerous managers was untainted by any credible evidence of unlawful behavior or animus directed against organizing activity.

middle of December of that year. (GC Exh. 15.) He testified that he participated in the campaign by attending at least 8 union meetings, driving others to the meetings, and discussing the Union with his coworkers.[16] His major organizing activity involved distribution of union literature, including authorization cards. He did this on the employee shuttle bus, at the employee cafeteria, and, primarily, in the dealers' lounge. These activities took place from December 2003 through February 2004.

It is also contended that LoManto's organizing activities took another form. On January 19, LoManto purchased several internet domain names including terms such as "casino employees" and "casino dealers alliance." (GC Exh. 13.) LoManto claimed that he planned to create websites to facilitate concerted discussions among dealers regarding the organizing campaign. This contention is undermined by his testimony that he has a longstanding practice of buying domain names. He owns 54 such names and reported that he buys them as "investment projects . . . they're a business venture." (Tr. 57.) He reported that he planned to solicit purveyors of goods and services to offer discounts to dealers through his websites. In any event, LoManto never took any steps to implement his plans beyond the purchase of the domain names.[17]

In his testimony, LoManto conceded that the Company's management did not hold any employee meetings to address the organizing effort. Similarly, it refrained from publishing any written commentary regarding the matter. He also agreed that, while other dealers were active in the organizing drive, no employee apart from himself was subjected to any disciplinary sanction arising from that union activity. However, he contended that management engaged in a campaign against him designed to discourage his participation in the organizing activity.

LoManto indicated that management's effort against him began in early January. Around that time, he was in the dealers' lounge "with some people discussing the Union." (Tr. 52.) He was seated at a table and had union literature and cards displayed. Three other employees were seated with him at this table. Director of Casino Administration Evans entered the lounge. LoManto testified that she came within 3 feet of his location, their eyes met, and she uttered the phrase, "[o]h, my," and walked out. By contrast, Evans testified that she never saw LoManto engage in union activity in the lounge or elsewhere. Specifically, she also denied ever seeing LoManto seated at a table containing union literature.[18]

LoManto testified that he knew the identities of the other employees asserted to be present during this event. None were called to testify. I certainly recognize that employees may well be reluctant to testify against their employer in contested labor disputes. On the other hand, by the time of this trial the organizing campaign had been over for 8 months. No other employee had been disciplined and there was no credible evidence of overt management hostility toward the campaign, lawful or otherwise. Finally, and most significantly, the event described by LoManto was rather innocuous. He did not contend that Evans made any statements beyond her brief utterance expressing surprise, nor did he assert that he suffered any direct consequence from her alleged observations. Given the virtually complete lack of

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[16] This is the only aspect of LoManto's testimony that was corroborated by another witness. Yeoman reported that LoManto attended 6 or 7 meetings and spoke at each one. He was "very vocal about his right to organize." (Tr. 292.)

[17] Yeoman corroborated the fact that LoManto discussed his purchase of the domain names at a union meeting. As I have indicated, nothing came of his plans.

[18] The Company's rules of conduct do not prohibit solicitation of coworkers in the dealers' lounge during break periods. See, the Company's Handbook, p. 15. (GC Exh. 14.)

corroboration in LoManto's accounts, I conclude that it would have been probative for the General Counsel to have provided such testimony regarding this episode given that LoManto claimed that several persons whom he knew witnessed the event. As the information regarding the identities of these alleged witnesses was solely within the knowledge of the General Counsel and Charging Party, on these facts, I draw an adverse inference from the failure to produce such evidence or to provide a specific explanation as to why it could not be produced. *Martin Luther King, Sr., Nursing Center,* 231 NLRB 15, fn. 1, (1977).

LoManto reported that shortly thereafter, in mid-January, he was again seated at the same table in the lounge with union literature and cards spread out before him. He was discussing the Union with coworkers. He testified that Vice President of Casino Operations Niceta entered the lounge. He moved to the middle of the room and "made a statement projecting outward." (Tr. 54.) The statement was that, "the dealers were cowards and that [t]he Union would never get in." (Tr. 54.) Nobody responded and Niceta abruptly walked out of the room.

Niceta denied the occurrence of any such event. Once again, LoManto's account is uncorroborated by any testimony from persons alleged to have been present.[19] Beyond this, I found Niceta to be a particularly persuasive witness. He projected a balanced view of the circumstances involved in this case and left the impression that he had been rather fond of LoManto prior to the events at issue and continued to harbor no animus against him. For example, he unhesitatingly described LoManto as having been a "good" employee prior to these events. (Tr. 738.) He also expressed tolerance and even appreciation for LoManto's rather extravagant sideburns, an issue that had provoked controversy among other managers. I credit Niceta's contention that the startling and provocative event described by LoManto did not occur.[20]

LoManto's account of management's antiunion campaign continued with his description of an event in mid-February. At that time, he was located near the casino office adjacent to the baccarat pit. He reported that Casino Manager Natello and another individual were walking toward him while engaging in a conversation. According to LoManto, Natello stated to the other individual, "[l]et them get it in. It's a weak union anyway." (Tr. 56.) LoManto indicated that Natello was approximately 4 feet from his location when he made the remark. He characterized Natello's tone as joking and sarcastic. On cross-examination, LoManto acknowledged that Natello was not addressing him. He merely overheard a conversation between Natello and another individual. LoManto agreed with counsel for the Company's assertion that this person may have been a pit boss. He based this conclusion on the fact that the person was located at the pit boss stand for the baccarat pit.

Once again, the management official asserted to have made the antiunion remark, in this case Natello, completely denied having ever made such a comment to anyone. I note that

[19] In this instance, I do not draw an adverse inference. If LoManto's account were true, the far more pointed nature of Niceta's alleged statement could have inhibited the willingness of employees to testify. Nevertheless, the fact remains that LoManto contends that witnesses were present. Despite this, his account is completely uncorroborated.

[20] In rejecting LoManto's account, I also note the inherent implausibility of his claim regarding Niceta's supposed behavior. Even counsel for the General Counsel concedes that LoManto's description indicated that Niceta made an "out of the blue" statement. That statement purportedly denounced some of his employees as cowards. (GC Br. at p. 35.) Such an unprovoked, out-of-context, hostile statement strikes me as improbable.

this type of allegation involving an allegedly overheard private conversation between a manager and an unnamed second party is particularly susceptible to abuse. Given my concerns about LoManto's overall credibility and the lack of any corroboration, I reject his description of this event.

At approximately the same time as the supposedly overheard conversation, LoManto contends that another, more direct, incident involving antiunion animus occurred. He claims that he was standing at the scheduling board in the casino office hallway when Niceta approached him and asked about his "websites." (Tr. 61.) LoManto reported that he described the sites to Niceta, explaining that he planned to create a chat room and to offer employee discounts on the sites. He did not indicate to Niceta that the sites would be used for any organizing activity. LoManto contends that Niceta then told him that "it was in my best interest not to put them up." (Tr. 62.) Once again, the salient facts about this claim are that it is uncorroborated and that the management official alleged to be involved has repeatedly and totally denied it. Niceta testified that he never had such a discussion and knew nothing about any websites being planned by LoManto. Given my previously described assessments of the veracity of these two witnesses, I reject LoManto's account.

At this point in the chronology of events, for the first time the parties all agree that an incident occurred on February 21. LoManto was dealing blackjack in pit 12 at approximately 5 p.m. He testified that a patron was sitting in one chair at the table and placing his money in the space allocated for the neighboring chair. That chair was unoccupied. LoManto reported that he asked the patron to move his money to the position in front of his seat.[21] He contends that the player responded by asking, "[w]hy are you fucking with me? Why are you giving me a hard time?" (Tr. 113.) The player did move his money. However, one of the player's companions called LoManto, "fat fucking Elvis." LoManto reported that Pit Manager Pilleggi overheard the dispute and came over. He sent LoManto on break. At the same time, LoManto testified that Pilleggi told the customers, "I want to make you happy and I'll handle this." (Tr. 114.) When LoManto returned from his 20-minute break, Pilleggi instructed him to prepare an incident report regarding these events. Subsequently, he returned to his work, but was subjected to further abuse by these patrons in the form of repeated references to him as "fat fucking Elvis."

LoManto's version of this incident was vigorously disputed in the testimony of a casino patron, Dr. Ossakow. Ossakow, a dentist who resides in Virginia, testified that he has patronized casinos from 30-50 times. He was a guest at Caesars on February 21. It was his fourth visit to this establishment. He was playing blackjack with two companions, Lorenzo Thrower and Kevin Milano. He confirmed LoManto's testimony that Thrower was seated at one position and had placed his money in the neighboring vacant position. However, he also testified that LoManto peremptorily moved Thrower's money to the position in front of his seat. Thrower subsequently returned it to the adjacent location. LoManto moved it again, in what Ossakow characterized as "a hostile fashion." (Tr. 301.) This happened repeatedly, whereupon Thrower asked LoManto, "[w]hy are you messing with me?" (Tr. 302.) LoManto responded that, "[y]ou got to play by the rules." (Tr. 302.) Ossakow described LoManto's conduct as "bullying."[22] (Tr. 302.)

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[21] In his testimony, he described his actions as mild-mannered, "I simply asked the gentleman, can you please move your money in front of your bet?" (Tr. 113.) However, in his contemporaneous written account in his incident report, he described a more high-handed approach to the customer, noting that, "I instructed the player that he was seat[ed] in chair two and his wager was required to be in front of him." (GC Exh. 46.)

[22] In describing LoManto's treatment of Thrower, Ossakow testified that, "I've probably been

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Ossakow noted that play continued. He was betting from $100 to $400 per hand. At one point, he placed a $100 bet and won. LoManto paid him only $75. He drew this underpayment to LoManto's attention. According to Ossakow, LoManto responded by stating, "Oh yeah, right, you know, you're a cheater." (Tr. 303.) He accused Ossakow of cheating at least 3 times during their increasingly heated exchange. The commotion drew the attention of the pit boss who came over. He sent LoManto away and provided Ossakow with his missing $25. Shortly thereafter, he asked Ossakow if he would complete an incident report. Ossakow complied, writing that LoManto had been,

> extremely unprofessional, rude, and more importantly he questioned my character by accusing me of cheating . . . . If I owned this place I wouldn't want David representing my business.

(GC Exh. 44, Tr. 325.) Ossakow testified that, "I thought for sure that guy would be fired." (Tr. 309.) He has not returned to Caesars since the incident.

Thrower and Milano also prepared incident reports. Milano noted that LoManto had shortchanged Ossakow and accused him of cheating. He reported that LoManto had made "insulting remarks" and "got rude." (R. Exh. 6.) Thrower stated that LoManto "insulted me because I didn't place my bet inside the right circle in front of me." (R. Exh. 7.)

LoManto strongly denied calling any player a cheater. Equally strongly, he denied having shortchanged any customer or even being involved in any dispute about shortchanging a customer.[23] I have already noted that Ossakow's account was corroborated by the written statements of his companions. It was also supported by the statements and testimony of LoManto's two immediate supervisors, both of whom were present on the floor that day. Table Games Supervisor Krasowski testified that, although she was nearby, she did not overhear much of the exchange between LoManto and the customers. However, her attention was

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through 100,000 hands of blackjack or probably more, and I've never seen that type of rudeness and just a bully." (Tr. 317.)

[23] After hearing Ossakow's testimony, LoManto was recalled as a rebuttal witness. As was his wont, he shifted his position on rebuttal by raising an entirely new issue. He claimed that he had never seen Ossakow before viewing him during the trial. Instead, he asserted that, "[q]uite possibly" Nebbett had "fabricated" Ossakow's statement. (Tr. 793.) In his brief, LoManto went further, asserting that the Company, "made up this incident . . . it was fabricated just as they wanted it to be." (CP Br. at p. 2.) However, although claiming that the entire incident was manufactured, in his testimony LoManto did concede that he recalled that, in the words of counsel for the General Counsel, "he had asked a player to move his chips." (Tr. 790.) Thus, he admitted that a vital part of the February 21 incident had occurred. I completely reject any claim that Ossakow was part of a plot to create evidence against LoManto. He was subjected to extensive cross-examination by both counsel for the General Counsel and LoManto himself. He was never asked about his bona fides as a witness. For example, he testified that he drove from Virginia to Philadelphia to attend the trial. It would have been a simple matter to ask him to produce his driver's license to verify that he was who he purported to be. The claim of fabrication is simply a last ditch gambit offered by LoManto in recognition of the damaging nature of Ossakow's account, testimony made more persuasive by the fact that he had no significant stake in the outcome of these proceedings. (I note that counsel for the General Counsel accepts Ossakow's testimony regarding his identity, describing him as "a 32-year old dentist from Chantilly, Virginia." (GC Br. at p. 10.))

eventually attracted by the noisy dispute. At that point she heard Ossakow tell LoManto,

> You can't call me a cheat. You're questioning my integrity, you're questioning my honesty.

(Tr. 369.) This is significant for two reasons. First, while LoManto concedes that he had a dispute with Thrower over the placement of money, he denies any dispute with Ossakow. Second, LoManto adamantly denied that he was involved in any disagreement over shortchanging a customer and equally adamantly denies ever having accused the customer of cheating. The comments heard by Krasowski support Ossakow's account as to both points.

Krasowski reported that she did not intervene in the dispute because her own supervisor, Pilleggi, arrived at this juncture. She deferred to him. As has been noted, Pilleggi no longer works for the Company and was not called as a witness. However, the Charging Party introduced Pilleggi's statement into evidence. That statement strongly supports Ossakow's account. He wrote that he was called to the game by three players "who were very angry at the dealer's behavior." They reported that LoManto was "very rude" and "accused Mr. Ossakow of cheating, attempting to cheat." (CP Exh. 4.) He also indicated that they complained that LoManto "kept dogging Mr. Thrower in an aggressive rude manner about how and where he was placing his wager." (CP Exh. 4.) Pilleggi goes on to describe his investigation of this report, noting that the customers appeared to be "very calm gentlemen" who were greatly agitated by the episode. He spoke to the casino host who was responsible for providing hospitality to the men. The host "spoke highly of these patrons, being very fun, polite and generous." (CP Exh. 4.) Pilleggi concluded by observing that, "[t]his seems to be an ongoing problem with Mr. LoManto and should be dealt with in a stern fashion." (CP Exh. 4.)

Shift Manager Nebbett testified that Pilleggi called him to report that he had a situation involving three patrons and a dealer. He indicated that the dealer had accused one of the customers of cheating. Nebbett came to the floor and spoke with the three customers. Milano told him that LoManto had been "unnecessarily rigorous with the rules" and had then accused Ossakow of cheating. (Tr. 512.) After speaking with the three men, Nebbett testified that he concluded that they:

> seemed to be perfectly forthright, nice people. I didn't notice anything unusual about the way they were acting that would cause them to become agitated, other than what took place.

(Tr. 513.) The men calmed down after their conversation with Nebbett. He offered them compensation, but they refused the offer. Nebbett testified that he concluded they were being truthful.[24] Among his reasons for reaching this conclusion was the fact that,

> [i]t was a $25 chip, and for a gentleman that's betting two or three hundred dollars a hand, it wasn't that important to him. It was important because he had been accused of cheating.

[24] I reject counsel for the General Counsel's speculation that Ossakow's behavior may have been affected by alcohol. (GC Br. at p. 12.) Ossakow credibly testified that he consumed only one drink. Ossakow's apparent confusion regarding the time of the incident is far too slender a reed to support counsel's supposition that he was intoxicated. The credible evidence is to the contrary.

(Tr. 554.)

Once again, I am faced with evaluation of LoManto's uncorroborated testimony regarding a disputed event. In this instance, resolution of the conflict is relatively easy. The primary witness disputing LoManto's account is Ossakow. Considering the two men's respective degrees of interest in the matter, it is apparent that Ossakow is a far less interested party. This lends weight to his account. In addition, I found him to be a sober, responsible, and credible informant. Beyond that, his version was extensively corroborated by the testimony and statements of his two companions and the two supervisors present on the floor. Finally, even LoManto's version serves to corroborate significant aspects of Ossakow's account. While LoManto strongly disputed the description of his interaction with Ossakow, he largely agreed with the description of his dispute with Thrower. Thus, he concedes the general nature of what transpired during half of the events at issue. In addition, LoManto's testimony and his written incident report both note that Pilleggi's immediate reaction was to send him away from the table while telling the customers, "he wanted to make them happy." (GC Exh. 46.) While I recognize that it may always be desirable to placate unhappy patrons, LoManto's description of Pilleggi's reaction to what he encountered suggests that Pilleggi was disturbed by what he had heard regarding LoManto's behavior. In sum, I find that the February 21 incident occurred, and that it involved serious misconduct by LoManto consisting of a pattern of poor customer relations culminating in the leveling of a very serious accusation against a patron.

Based on his preliminary investigation, Nebbett decided to refer LoManto's conduct for evaluation through the Company's formal disciplinary process. He based his conclusion on the fact that, as he put it, "[u]nder no circumstances" should a dealer accuse a customer of cheating. (Tr. 526.) As a result, he compiled the written statements from the 3 patrons, along with additional statements from Pilleggi and LoManto. He transmitted these to his superiors, Natello and Evans. Nebbett testified that he considered imposition of an investigatory suspension, but decided against this strong measure because LoManto had no prior history of formal discipline and no management witness had actually heard LoManto's statements to the customers.

In the words of it's handbook, the Company, "usually applies progressive discipline to correct employees' unacceptable behavior or performance (i.e. warning letters before termination)." (Handbook at pp. 16-17, GC Exh. 14.) However, the handbook also notes that the Company retains the right to impose termination, "depending upon the circumstances." (Handbook at p. 17, GC Exh. 14.)

Director of Casino Administration Evans described the procedures used in effectuating the Company's disciplinary process. If it is determined that an employee may be subject to discipline that is more severe than a verbal warning, written statements from those involved are prepared. These are forwarded to Evans and Casino Manager Natello. They consider the case individually and then confer with each other. If they determine that formal discipline is required, the documents are transmitted to the labor relations department. At that point, Evans, Natello, and appropriate representatives from labor relations meet and determine the precise level of discipline. Decisions under this tripartite process are made by consensus. The options include verbal warning, first written warning, final written warning with or without unpaid suspension, and discharge.

Evans testified that she and Natello received the statements about the February 21 incident and conferred. They determined that they needed a statement from Krasowski. Nebbett was instructed to obtain this statement and he did so. Natello also spoke to Nebbett to obtain his assessment of the customers. He testified that Nebbett gave a favorable account of

the customers' demeanor, reporting that "they seemed like they were very nice gentlemen who were having a good time and were very offended by what had taken place on the game." (Tr. 681.)

Having obtained the additional information they deemed necessary, Evans and Natello met again during the first week of March. Evans testified that they considered the seriousness of the incident as demonstrated by the fact that 3 patrons took the trouble to write reports about it. This was highly unusual. Natello also reported that he had never before heard of a dealer accusing a customer of being a cheater. They also considered LoManto's lack of prior history of formal discipline. As Evans put it, he had a "good record." (Tr. 608.) Finally, they observed that no management official had actually heard LoManto utter the words that were the subject of the complaint.[25] Based on consideration of these factors, Evans was in favor of a final warning. Natello convinced her that an ordinary written warning would be sufficient. This joint recommendation for a written warning was forwarded to labor relations where it was considered by Director of Labor Relations Fineran and a staff member, Renee Merlino. Their initial reaction was that LoManto should be terminated. After hearing the rationale behind Evans and Natello's recommendation of a written warning, they agreed to this lesser sanction.

On March 2, Evans wrote the formal warning to LoManto using the Company's disciplinary notice form.[26] It advised LoManto that he was receiving a written warning for "inappropriate comments to customers while dealing." (GC Exh. 3.) It also warned that additional similar incidents might result in further discipline, including termination. Evans signed the form on March 2 and transmitted it to Nebbett. Nebbett signed it on the following day. He retained it in his office for issuance to LoManto.

While the disciplinary process was underway, on approximately February 27 or 28, LoManto and Krasowski had a conversation. While both agree that they spoke to each other about the February 21 incident, they differ on the content of the conversation. LoManto reported that Krasowski approached him and advised him that she had been ordered to prepare an incident report regarding the events on February 21. He states that she expressed the hope that management was not trying to get him into trouble. In contrast, Krasowski indicated that LoManto approached her to ask "if anything occurred" regarding the incident on February 21. She informed him that she had been instructed to prepare an incident report. She denied making any comment regarding management trying to get him into trouble.

I have already expressed my general conclusions concerning the credibility of LoManto and Krasowski. Beyond those, I note that Krasowski's version strikes me as inherently more plausible. LoManto had recently become involved in a heated exchange with several customers. A supervisor had intervened. Shortly thereafter, he was ordered to prepare a written report regarding the event. It is certainly not surprising that he would approach his immediate supervisor several days later in an effort to determine the status of the episode. In contrast, it is less likely that the supervisor would volunteer information regarding the ongoing disciplinary process to the employee who was the subject of that scrutiny. And, it is even less likely that the supervisor would comment about the attitude and motivation of her superiors while the process was underway. For these reasons, I credit Krasowski's account of the conversation.

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[25] Evans noted that, had such verification from a supervisor existed, LoManto "would probably have been terminated." (Tr. 609.)

[26] There was some delay in resolution of the disciplinary process because Evans was on vacation during this period.

While the warning letter to LoManto sat in Nebbett's files awaiting issuance, a second major incident involving LoManto occurred on the afternoon of March 5. Once again, all parties agree that a dispute arose between LoManto and casino patrons, but their accounts of the details are widely divergent. LoManto testified that he was working at pit 15, dealing 3-card poker. Krasowski was his immediate supervisor and Pit Boss Solomon was in overall charge of the area. LoManto indicated that he first experienced problems with patrons at approximately 2:20 p.m. Two Asian ladies were showing each other their cards. LoManto told them to cease. They replied that they had been doing this for some time and had not received any complaints about it. A male patron supported the ladies by interjecting that, "he never heard of such a thing." (Tr. 76.) LoManto testified that he called for Krasowski, she arrived and instructed the ladies not to show their cards.[27] They apologized and, according to LoManto, "everything was fine." (Tr. 78.)

Later that day, at approximately 3:40 p.m., LoManto returned from a break and resumed dealing 3-card poker. At that time, three regular casino patrons, Dolly Adams, Helen Costello, and Leah Kelly, were seated at his table. LoManto testified that one of the ladies began showing her cards to another. In addition, other players could also see the cards. He told the customer that, "I'm sorry, you can't show your cards." (Tr. 81.) He contends that she told him to mind his own business. He responded that he had rules he was required to follow. She replied that, "[n]obody else says nothing."[28] (Tr. 81.) According to LoManto, he called Krasowski, who instructed the ladies not to show their cards. They agreed.

Having apparently resolved the problem with the patrons, LoManto now became embroiled in a second controversy with them. He testified that one of the ladies gave another one a poker chip. As a result, in his view, "the integrity of the game was compromised." (Tr. 82.) He testified that he again summoned Krasowski, who told the customers that they could not share money. LoManto proceeded to deal the next hand. At that time, customers both shared funds and showed each other their cards. In addition, LoManto indicated that two of the ladies began conversing in a foreign language, yet another rule infraction. He called for Krasowski. The exasperated customer asked LoManto, "[w]ho do you think you are, Elvis or something?"[29] Another patron chimed in, adding that they had been doing this all night without any complaint. A third lady stated, "[w]e'll just get rid of him." (Tr. 84.) The second lady responded by raising a fist and chanting, "[t]he power of the people."[30] (Tr. 84.) The ladies began clapping and, in LoManto's words, created a "ruckus." (Tr. 85.) In his contemporaneous incident report, he described what happened next:

> At this point I had stopped dealing[.] [T]hey were causing such a commotion that the entire pit was looking over. All the patrons and dealers.

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[27] At trial, Krasowski was not asked about this episode.

[28] In a revealing aside that displays his lack of insight regarding the impact of his manner of behaving on customer's feelings, LoManto observed that at this point in their exchange, the lady was "automatically developing an attitude." (Tr. 81.)

[29] The repeated references to LoManto as Elvis Presley relate to the fact that he bears some physical resemblance to the famous rock idol. This is further enhanced by the way he keeps his sideburns. LoManto testified that, while he worked at Caesars, both employees and patrons often referred to him as "Elvis."

[30] LoManto described this as an imitation of a notorious event involving American Olympic athletes.

(R. Exh. 2, p. 2.) Given the situation, both LoManto and Krasowski called for Solomon.

LoManto informed Solomon that, due to repeated player rule infractions, he felt "uncomfortable dealing the game." (Tr. 85.) He testified that Solomon told him that the ladies were not trying to cheat, but were merely there to have fun. He instructed LoManto to resume dealing. LoManto testified that he complied. Immediately thereafter, one lady showed her cards to another. He again called for Krasowski. At this point, the patrons left the table.

In his testimony, LoManto revealed a lack of comprehension regarding the reaction of the customers to his behavior. He reported that,

> [t]hey didn't seem upset. They just seemed like they were projecting themselves to cause a scene and make a spectacle of me.

(Tr. 166.) Later in his account, he appeared to gain some comprehension of the consequences of his manner of approach to the ladies, observing that "they felt I was making them look silly or stupid." (Tr. 169.) Still later in his testimony, he reverted to his earlier inability to accurately perceive the customers' reactions, strongly asserting that they were not upset by his conduct in any way.

Under cross-examination, LoManto's description of his reasoning during this key event shifted in a characteristic and revealing manner. He testified that he requested that Solomon obtain Nebbett's presence at the table to deal with the incident. Counsel for the Company asked him why he had made this request. He responded that he asked for the shift manager's presence because he was questioning the decisions made by Krasowski and Solomon. As he put it, "I thought they were taking the matter much too loosely." (Tr. 228.) When counsel noted that this meant that the reason for the request was his concern regarding supervisory misconduct, LoManto changed his account, contending that he called for Nebbett, "for the whole incident, about the abuse, the comments that they [the customers] were making." (Tr. 230.) Counsel then took LoManto through the claimed abusive conduct, making it evident that the customers had not engaged in any profanity or threats. Rather, LoManto conceded that his concern was with their "sarcasm." (Tr. 231.) He displayed his unique view of customer relations by opining that the casino's patrons were "supposed to have a responsibility to themselves to be respectful citizens."[31] (Tr. 238.)

Krasowski testified that, as was her duty, she had been observing the players at the 3-card poker table prior to LoManto's arrival. She indicated that the mood was, "very relaxed, everyone was laughing and having a good time." (Tr. 348.) She did not see any rule infractions, although she did notice that customers were showing each other their hands, a "little bit." (Tr. 348.) She did not consider this as cause for concern.

After LoManto took over as the dealer, he instructed one of the ladies to cease showing her cards, adding that he was "the only one that enforces the rules." (Tr. 356.) Krasowski

[31] In contrast, Nebbett expressed management's view by observing, "this isn't Macy's. This is a casino where people lose money. They say things without thinking a lot of times. So we chose to give the benefit of the doubt once, at least, to a patron. It's a fact. It's the nature of the business, and it's just the way it is; and everybody that works in the business knows that." (Tr. 578.)

reported that LoManto's tone was, "very bossy, he was very rude, he was very loud." (Tr. 357.) She came over and told him to "please be quiet and just deal the game." (Tr. 357.) Despite these instructions, LoManto continued to demand that the players not show cards and not speak in a foreign language, "repeating the same things over and over." (Tr. 359.) As a result, the players were becoming angry, "telling him he's rude and they don't like being spoken to in the manner he was speaking to them, they came here to have fun." (Tr. 359—360.) Other players applauded these comments and the game ceased.

Noting that play had ceased, Krasowski testified that she again instructed LoManto to deal. As she put it, "that's when he told me no. And he said, 'The players are rude and I'm not dealing.'" (Tr. 361.) She again told him to resume dealing and he again refused. In her testimony, Krasowski agreed with LoManto that both she and LoManto then called for Solomon. By this point, three of the customers had left the table in anger. When Solomon arrived, he spoke to LoManto and informed Krasowski that LoManto was to be quiet and resume dealing.

After being ordered by Solomon to resume dealing, LoManto complied. Disregarding the instruction to remain quiet, LoManto began talking to the one patron who had been present during the controversy and who had remained at the table. He told her that he was the only dealer who enforced the rules. Krasowski heard him make this remark.

In his role as Charging Party, LoManto cross-examined Krasowski. He asked her to characterize his conduct toward the customers that day. She replied:

> You were being a bully. You were trying, you were being a bully to the women at the table . . . . You were telling them constantly in a horrible manner not to look at each other's cards, not to touch anyone's money, not to touch the cards, and it was just constant.

(Tr. 414.)

Solomon also testified regarding his participation in these events. He confirmed that both LoManto and Krasowski called him over to the table. LoManto told him that the players were being rude to him. Krasowski told him that LoManto had stopped dealing. Solomon testified that he instructed LoManto to resume dealing, and he complied. Solomon then phoned Nebbett and informed him of the incident. He also sent for a replacement dealer. When the replacement arrived, Solomon took LoManto away from the table for a private conversation.

In a rather striking bit of testimony, Solomon reported that LoManto's first words to him after being led away from the customers were, "[t]his could be a potential lawsuit."[32] (Tr. 442.) LoManto added that he was the only employee who enforced the rules. Solomon told LoManto that, "it was inappropriate for him to act like this and to keep quiet and go back on the game and deal." (Tr. 441.) Two of the customers left the table, approached Solomon, and told him "that they didn't come to Caesars to be treated this way." (Tr. 443.) He offered them a complementary meal and they declined. Solomon returned to the table and apologized to the third lady who was still present. She observed, "I guess David was just having a bad day." [33]

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[32] Solomon also reported this peculiar prediction of the possibility of future litigation in his contemporaneous written incident report. (GC Exh. 47.)

[33] One of the patrons, Adams, was a regular customer who was known to Nebbett. He reported that she also approached him and told him that LoManto "was both very rude and

Continued

(Tr. 444.)

Solomon testified that "[a]lmost immediately" after being told to be quiet and resume dealing, LoManto "started talking about the incident again." (Tr. 445.) He reported that he observed LoManto talking and that Krasowski heard the actual conversation and reported to him that it was about the incident. Solomon phoned Nebbett and described these events. Nebbett instructed Solomon to send LoManto to his office. He secured a replacement dealer and told LoManto to report to Nebbett.

Under cross-examination by LoManto, Solomon was asked why he had tolerated conduct by the patrons that involved harassment of a dealer and why he had felt it appropriate to offer the patrons a complementary meal. He responded:

> At that time I thought what you had said to them was embarrassing and inappropriate, and I don't think they were harassing you other than the fact that they had said things were much better before you came on the table.

(Tr. 478.) He noted that the situation would have been different if the patrons had used profanity or uttered threats.

The focus of this narrative of events must now turn to the interaction between LoManto and the managers involved in his termination. Events began with LoManto's meeting with Nebbett in Nebbett's office. LoManto contends that their initial meeting on March 5 lasted for approximately one hour, including some interruptions. After shaking hands, Nebbett began by asking, "what had happened to me suddenly." (Tr. 93.) LoManto asked what he meant. LoManto contends that Nebbett then made reference to "my union involvement with Local 331." (Tr. 93.) He went on to tell LoManto that this was bringing problems onto himself. As LoManto put it, Nebbett told him to, "shut up, keep my mouth shut." (Tr. 93.)

LoManto reported that he was feeling ill. He asked Nebbett for permission to get something to eat and to visit the nurse. Nebbett denied both requests, instead handing LoManto the written warning arising from the February 21 incident. He asked Nebbett what it was about; however, he also indicated that at that time he did recall the incident referred to in the warning letter. He explained his version to Nebbett, noting that, "I shouldn't have to deal with people that abuse the dealers, that degrade the dealers." (Tr. 96.) Nebbett asked LoManto to sign the warning letter as acknowledgement that he had received it. LoManto refused.

Discussion next shifted to the March 5 incident. LoManto advised Nebbett to view the overhead surveillance tape of this incident because, "it would prove my innocence rather than their submission of my guilt." (Tr. 97.) In his written account, LoManto also reported that he told Nebbett that, "I would not deal to customers trying to abuse me." (R. Exh. 2, p. 3.) Discussion also turned to the subject of LoManto's sideburns. Nebbett informed him that they violated casino appearance rules and should be "shaved off by the next time you come in." (Tr. 98.) LoManto responded that,

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insulting. So much so that they were compelled to walk away from the table. Ms. Adams said that David had accused them of trying to cheat." (GC Exh. 49.) He offered her a complementary meal and she accepted.

> there's people [employees] with dreadlocks, when they twist—they have cornrows and it's real tight. I said they don't wash their hair for three or four months. I'd be more concerned about their hygiene than my sideburns that are neatly groomed.

(Tr. 98.) As the meeting drew to a close, LoManto testified that he asked Nebbett for permission to return to the floor to obtain witness statements from employees and customers who had been present during the incident earlier that afternoon. He reported that Nebbett granted him permission, instructing him to tell Solomon that this was allowed.

LoManto testified that he proceeded back to the floor and told Solomon that Nebbett had authorized him to take witness statements. Solomon declined to grant permission for this activity.[34] LoManto then proceeded to visit the nurse. While he was there, she received a telephone call from Nebbett instructing her to inform LoManto that it was "imperative" that he return to Nebbett's office before leaving the casino. (Tr. 102.) When he complied, Nebbett instructed him to complete an incident report regarding the episode that had occurred that afternoon. LoManto objected that he was ill. Nevertheless, he was required to write the report and he did so. He testified that this task took him approximately two-and-one-half hours to complete. He then requested permission to leave, noting that, "I want to go to a hospital. I want to get checked out." (Tr. 103.) Once again, LoManto contends that Nebbett denied permission for him to leave, telling him to remain while Nebbett obtained and reviewed the surveillance tape. As a result, LoManto went to the cafeteria and ate.

LoManto reports that he and Nebbett had a final meeting approximately 30 to 45 minutes later. Nebbett informed him that he had reviewed the tape and had not observed any customer infractions. He informed LoManto that he was being placed on investigatory suspension and should contact Evans on the following Monday. LoManto then left the casino and sought medical evaluation. He was examined and released.

Adhering to the well-established pattern in this case, Nebbett's testimony contradicts that of LoManto as to many key points regarding their conversations on March 5. Nebbett testified that Solomon had phoned him to report that LoManto had refused to deal. He directed Solomon to send LoManto to his office. According to Nebbett, when LoManto arrived,

> I tried to get to the reason of the patrons—why they were upset and try to make him understand why they were upset; and it seemed that the way he was presenting to me was that he was more concerned with enforcing the rules than how he was enforcing the rules. And I tried to explain the difference between enforcing the rules and correctly addressing customers and politely addressing customers, and that wasn't apparently sinking in. I wasn't getting anywhere.

(Tr. 530.) In his contemporaneous written account of the meeting, Nebbett stated that he told LoManto that the issue was "his poor judgment and inability to express himself to patrons in a polite and courteous manner." (GC Exh. 49.) He noted that LoManto's response was to refuse to accept any "culpability." (GC Exh. 49.)

[34] Solomon testified that LoManto did ask permission to take witnesses statements. However, he did not mention any authorization from Nebbett. Solomon denied the request because it would have been disruptive.

Nebbett testified that he issued the February 21 warning letter to LoManto. LoManto responded by explaining that, once again, he was just enforcing the rules. Nebbett agreed with LoManto's assertion that he objected to the appearance of LoManto's sideburns, telling him to trim them before they caused him to receive further disciplinary action. Nebbett also agrees that LoManto reported that he was not feeling well. He indicated that he wished to go home. Nebbett asked him to complete a written statement first and he agreed to do so. While confirming that these things happened, Nebbett strongly and completely denied that he raised the subject of LoManto's organizing activity. Indeed, Nebbett asserted that this would have been impossible since he was completely unaware that LoManto was involved in the Union's campaign. Nebbett also denied that LoManto requested permission to obtain witness statements.

At this juncture, Nebbett reached a decision regarding further disciplinary action. Having reviewed the videotape of the March 5 incident and spoken to Adams, Solomon, and LoManto about it, he decided to impose an investigatory suspension. Nebbett testified in persuasive detail regarding his thought process,

> I reviewed everything and assessed and considered the previous occurrence [on February 21], which happened barely two weeks ago; and in this case, felt that a pattern of behavior had been established; and felt that, in this case, I should put him on investigative suspension.

(Tr. 537.) He went on to articulate his reasoning in more detail,

> I assessed the interaction of the three patrons from the previous [February 21] incident; the statements from Derek [Solomon]; the fact that Linda [Krasowski] was right there when this [March 5] incident took place. She was standing at the game when this took place[35], the second incident on March 5th, and [I] put a lot of credence in what she—the way she explained it to me; and again, the customer input; and the fact that Derek had spoken to David [LoManto] about it and asked him to refrain from discussing it any further when he went back onto the game, and he did not. All these things together added up to my pulling his license that day and putting him on investigative suspension.

(Tr. 537-538.) While Nebbett was not among the officials authorized to make the decision regarding the final discipline to be imposed on LoManto, he testified that when he placed LoManto on investigatory suspension he believed that the "likely outcome" would be his termination. (Tr. 567.) Finally, Nebbett concluded his participation on that day by drafting a written report regarding the incident.

After March 5, the Company followed the same disciplinary procedures that were

[35] By viewing the surveillance video of the incident, Nebbett was able to confirm Krasowski's presence at the table during the events. The tape was introduced into evidence and my own view of it, coupled with the testimony regarding its content, clearly establishes her presence. (GC Exh. 41.)

employed regarding the February 21 incident. Evans, Natello, and Fineran received and reviewed written statements from Krasowski, Solomon, Nebbett, and LoManto. In addition, Evans and Natello viewed the surveillance videotape.[36] All three members of the disciplinary panel reached the same conclusion, that termination of employment was the appropriate disciplinary sanction. In particular, Evans and Natello provided detailed testimony about their individual decision making processes. Although they approached the termination decision from somewhat different perspectives, they reached an identical conclusion.

Evans testified that the videotape did not reveal any customer behavior "that would have compromised the game to the point where the Dealer would have to refuse to deal." (Tr. 614.) She noted that the showing of cards to another player would not give anyone an advantage over the house since, in the game of 3-card poker, "each hand stands on its own." (Tr. 641.) Evans concluded that LoManto should be terminated for the offense of insubordination. In her view, LoManto had been insubordinate when he refused to obey Krasowski's instructions to resume dealing. Furthermore, he was again insubordinate when he chose to discuss the incident with a customer immediately after being instructed by Solomon to be quiet. While these constituted her main objections to LoManto's behavior, she also noted "his rudeness in the way he applied the rules of the game to the customers." (Tr. 613.) Finally, she took into account a pattern established by the two incidents. As a result, she was in favor of termination of LoManto's employment.

Natello testified that he placed particular weight on his investigatory meeting with Krasowski, during which they viewed the videotape together. He noted that,

> she was right there, and she heard everything that was transpiring between David and the customers in terms of what he was saying, the tone of this voice, and—and what she said—[he] was rude. She had informed him to continue dealing, which she had pointed out he had not.

(Tr. 656-657.) Natello also observed that he did not see anything on the tape indicating significant misbehavior by the players. He agreed that there was some showing of cards, but nothing that would have affected "the integrity of the game." (Tr. 666.) Interestingly, Natello placed a slightly different take on LoManto's conduct during the incident than that described by Evans. He explained his reasoning, noting that,

> there certainly was two separate reported instances of insubordination; but my—the purpose of my decision was—what I weighed it in was the fact of what transpired on the game, the rudeness, the disregard for our customers, the disrespect that was shown verbally in his actions. That's really what the heart of the matter was for me.

(Tr. 658.)

As indicated, Evans, Natello, and Fineran all agreed on the imposition of termination. On March 11, a termination notice was issued and mailed to LoManto. It stated that termination was based on "[m]isconduct/insubordination" arising from the March 5 incident. (GC Exh. 2.) It

[36] In Natello's case, he viewed the video with Krasowski in order to obtain her explanatory comments about the actions depicted on the tape.

also took note of the prior incident involving inappropriate comments. LoManto testified that he learned of his termination on March 15 during a conversation with Evans. She informed him that he could file a grievance if he wished. This was a reference to the Company's Board of Appeal procedure described in the handbook. (GC Exh. 14, p. 20.)

On March 19, LoManto filed his grievance, invoking the Board of Appeal procedure. (GC Exh. 43.) On March 25, he also filed the initial unfair labor practice charge involved in this case. (GC Exh. 1(a).) On August 4, the Board of Appeals held a hearing regarding the grievance. A labor relations employee conducted the proceeding. The Board was composed of two supervisors and a dealer. The panel heard oral presentations from LoManto and Nebbett and viewed the videotape.[37] It did not rule in LoManto's favor. LoManto has not been employed by the Company at any time since March 5.

D. Legal Analysis

1. The Alleged Violations of Section 8(a)(1)

Apart from the allegedly unlawful discipline of LoManto, the General Counsel asserts that the Company committed three separate violations of Section 8(a)(1) of the Act. Two of these involve statements supposedly made by Niceta in the weeks prior to the issuance of the discipline against LoManto. The third incident is alleged of have occurred during the March 5 disciplinary meeting between LoManto and Nebbett.

The first alleged violation concerns LoManto's contention that, in mid-January, Niceta entered the dealers' lounge and addressed a group of employees who were discussing the Union. LoManto testified that Niceta moved to the center of the room, stated that "the dealers were cowards and that the Union would never get in." (Tr. 54.) He then departed.

If uttered as contended by LoManto, Niceta's statement would have constituted an unlawful assertion of the futility of union organizing. *T & J Container Systems, Inc.*, 316 NLRB 771 (1995).[38] However, I find that the General Counsel did not meet his burden of proving that the statement was actually made. Niceta completely denied making it. None of the individuals that LoManto claimed as present were called to testify. As a result, I am limited to weighing the relative credibility of LoManto's accusation and Niceta's denial. For reasons previously discussed, I credit Niceta. As a result, there is no reliable evidence to support this allegation. In reaching this conclusion, I note that I have also considered "the totality of surrounding circumstances." *Madison Kipp Co.,* 240 NLRB 879 (1979). The credible evidence is devoid of any activity by the Company that would indicate animus, unlawful or otherwise, against the Union's organizing effort or the participation of the Company's employees in that activity. There is simply nothing to support LoManto's claim, and I reject it.

[37] LoManto testified that, during the Board of Appeals hearing, Nebbett admitted discussing LoManto's union activities during their March 5 meetings. Nebbett denied that this occurred. I find it inherently implausible, given that the Board of Appeals hearing took place months after the Regional Director had issued the complaint in this case alleging that LoManto was discharged due to his participation in those activities.

[38] It is interesting to compare Niceta's alleged description of the employees as "cowards" to the manager's description of union supporters as being "stupid" in the recent case of *Trailmobile Trailer, LLC*, 343 NLRB No. 17 (2004), slip op. at p. 1. In that case, the Board found no violation of Section 8(a)(1) in the manager's pejorative remark. Significantly, the Board also noted that the remark was not coupled with any suggestion that union organizing was futile.

The second alleged violation by Niceta concerns a conversation alleged to have occurred in mid-February. LoManto testified that Niceta approached him in a hallway to ask about his "websites." (Tr. 61.) He requested the names of the sites and their purpose. LoManto provided the names and described his plans for these sites as involving a chat room and an effort to obtain discounts for dealers on goods and services. LoManto claims that Niceta then advised, "it was in my best interest not to put them up." (Tr. 62.) Taking LoManto's account at face value, it is not entirely clear that Niceta was advising against the creation of the websites for reasons related to union activity. LoManto testified that he did not mention such activity in describing the sites and Niceta made no comment about the organizing campaign during their conversation. I do note, however, that the sites had names suggestive of possible organizing activity such as "casinodealersalliance.org." (GC Exh. 13.) If a reasonable listener were to conclude that Niceta's purpose in recommending that LoManto desist from his plans had been to discourage organizing activity, his statement would have been unlawful. *Keith Miller*, 334 NLRB 824, 825 (2001) (telling employee not to discuss the union with coworkers during nonworking times constitutes a violation of Section 8(a)(1).)

Assuming that Niceta's alleged statement was made to deter LoManto's organizing activity, I am still confronted by the fact that there is no evidence to support LoManto's account of the conversation. Once again, Niceta completely denies any such discussion. He also denies any knowledge whatsoever regarding LoManto's purchase of domain names involving casino employees. LoManto does not contend that there were witnesses to the alleged conversation. In addition, the fact remains that there is no evidence of a suspicious context that would lend support to LoManto's claim. It is undisputed that the Company did not commit any violations of the Act involving employees other than LoManto. Similarly, it is not alleged that the Company made any statements or took any actions in opposition to the organizing effort other than those asserted by LoManto. As a result, LoManto's uncorroborated claim stands devoid of support. Based on my assessments as to the reliability of the accounts provided by LoManto and Niceta, I find that the General Counsel has failed to carry his burden of proof as to this claimed violation.

The final alleged violation of Section 8(a)(1) concerns statements made by Nebbett during the disciplinary process on March 5 that led to LoManto's investigative suspension and ultimate termination. In addition to issuing LoManto a written warning arising out of the February 21 incident and an investigatory suspension resulting from the March 5 incident, LoManto claims that Nebbett brought up the issue of union activity. LoManto recounted that Nebbett advised him that he was aware of "my union involvement with Local 331 . . . . He said for me to shut up, keep my mouth shut." (Tr. 93.) If true, this would constitute a clear violation of the Act. *Teledyne Advanced Materials*, 332 NLRB 539 (2000) ("well established" that employer violates Section 8(a)(1) by telling employees they cannot discuss unionization.)

Later in his description of this conversation, LoManto indicated that Nebbett told him, "management said people were saying things about me." (Tr. 98.) He added that LoManto would continue to find himself in trouble "until it was over." (Tr. 98.) The General Counsel contends that this reference regarding reports to management about LoManto's activities constituted the creation of an impression of surveillance in violation of Section 8(a)(1). If Nebbett made these comments, it is not clear that they constitute such a violation. Recently, the Board has expressed some concern that ambiguous statements not be automatically construed as creating an unlawful impression that management has been spying on the organizing activities of its employees. For example, in *SKD Jonesville Division,* 340 NLRB No. 11 (2003), slip op. at p. 2.) the Board found no violation where a statement about what a manager had heard could have been based on corporate spying or simply the results of the

company's "grapevine.") See also, individual members' discussions of this question at footnote 10 in *Wake Electric Membership Corp.,* 338 NLRB 298 (2002). By contrast, the Board did find a violation when a manager told an employee that he had "heard" that the employee was circulating a petition about wages. *Sam's Club,* 342 NLRB No. 57 (2004), slip op. at p. 1-2.

I need not resolve the issue presented by Nebbett's purported choice of words since I conclude that he did not make the statements alleged by LoManto. Once again, the difficulty is that this allegation rests entirely on LoManto's uncorroborated account. No witnesses are asserted to have been present. There is no trustworthy evidence of a context of unlawful behavior by Nebbett or other officials of the Company. Indeed, there is no credible evidence of any opposition by the Company to the Union's organizing drive. In addition, the circumstances of the March 5 meeting suggest that LoManto's account is not plausible. The evidence shows that LoManto was sent to Nebbett's office in the immediate aftermath of an incident involving serious allegations of misconduct toward customers. Nebbett placed him on investigative suspension due to his involvement in this event. Nebbett testified that, in so doing, he believed that the "likely outcome" would be LoManto's termination from employment. Given this context, it would make little sense for Nebbett to suggest that LoManto's union organizing was under scrutiny or to tell LoManto to keep his mouth shut regarding his protected activities. Such a warning seems out of place during a disciplinary session arising immediately after customers had lodged a serious complaint and occurring immediately prior to the imposition of a suspension that ultimately resulted in termination. I do not find LoManto's version to be credible. Given Nebbett's belief that LoManto was about to be fired, it would make no sense for him to warn LoManto against participation in future union activities. Instead, I credit Nebbett's testimony that he never raised the subject of LoManto's organizing activities and never instructed him to desist from them. As a consequence, the General Counsel had not met his burden of proof as to this allegation.

2. The Alleged Violations of Section 8(a)(3)

The heart of the General Counsel's case against the Company is the contention that management issued a written warning, an investigative suspension, and a discharge to LoManto because it wished to discourage the protected union organizing activities of its employees in violation of Section 8(a)(3) of the Act. In order to evaluate this claim, I must apply the analytical framework established by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).[39] In *American Gardens Management Co.,* 338 NLRB 644 (2002), the Board reiterated the elements of this test, noting that the General Counsel must show than an alleged discriminatee engaged in protected activity, that the employer was aware of such participation, that the discriminatee experienced adverse employment actions, and that there existed a motivational link between the protected activity and the adverse actions. If these elements are established by a preponderance of the evidence, then the burden shifts to the employer to demonstrate that the same adverse actions would have been imposed even in the absence of the protected activity.

In assessing the evidence within this framework, I have first considered the direct evidence offered by the General Counsel in support of his contentions. As previously discussed, that direct evidence, except as to LoManto's union activity, consists entirely of LoManto's uncorroborated testimony. I have found that testimony to lack credibility. As a result, it cannot be relied upon as evidence in support of employer knowledge of LoManto's union

[39] The Supreme Court approved the Board's choice of methodology in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983).

activities or in support of the General Counsel's claim that the adverse actions taken against him were motivated by unlawful animus against his protected activities. See, *American, Inc.*, 342 NLRB No. 76 (2004), slip op. at p. 1, where the Board held that the judge properly refused to rely on discredited testimony as evidence of discriminatory motivation.

Although there is no credible direct evidence in this case, I recognize that the Board has held that it is "well established that a discriminatory motive may be inferred from circumstantial evidence and that direct evidence of union animus is not required." *Tubular Corporation of America,* 337 NLRB 99 (2001). In that case, the Board outlined the factors to be assessed, including any evidence regarding suspicious timing, the disparate nature of any discipline imposed, the quality of the employer's investigation and the reasons for undertaking such investigation, the opportunity afforded to the employee to address allegations of misbehavior, and the consistency of management's actions when compared to its disciplinary policies and its past practices. Finally, I note that the Board has also cautioned regarding the limits of such circumstantial analytical tools, observing that:

> [w]hile the General Counsel may rely on circumstantial evidence from which an inference of discriminatory motive can be drawn, the totality of circumstances must show more than a 'mere suspicion' that union activity was a motivating factor in the decision. [Citation omitted.]

Cardinal Home Products, Inc., 338 NLRB 1004, 1010 (2003). I will now discuss my analysis of each of these considerations as they affect the outcome of this case.

At the first step in the evaluative process, I must determine whether LoManto engaged in protected union organizing activities. It is clear that he did so. This was the only material aspect of his testimony that was corroborated by another witness. Union President Yeoman supported LoManto's description that he attended various union meetings and was "very vocal about his right to organize." (Tr. 292.) Documentary evidence also supports LoManto's testimony that he formally authorized the Union to act as his representative. Given this supportive testimony and evidence, I also credit his account of having distributed union literature and cards on the employees' shuttle bus, in the cafeteria, and, primarily, in the dealers' lounge. All of these activities fall within the protection of the Act.

The next element of the General Counsel's evidentiary burden concerns proof of employer knowledge of LoManto's union activities. I begin by noting what is not in dispute. Almost all of the Company's managers testified that they were aware that the Union was attempting to organize the dealers.[40] Nebbett, Natello, Fineran, and Evans indicated that they had seen union literature about the organizing effort. Niceta reported that, in addition to seeing literature, he was told about the campaign by a number of employees who initiated generalized discussions of the issue with him. Krasowski testified that she had heard conversations about this issue among dealers. Documentary evidence confirms that the Company had copies of union literature in its possession. In addition, the parties have stipulated that another company supervisor, Dottie Barone, had received a complaint from an employee regarding a coworker's request that he sign a union card.[41] (Parties' stipulation dated December 28, 2004, p. 2.)

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[40] Solomon testified that he was unaware of the organizing campaign.

[41] That supervisor sought review of the casino's videotapes regarding the complaint about union solicitation. I do not infer any animus from this. The stipulation reveals that the purpose of examining the tapes was to "attempt to narrow down the time and place of the incident."

Continued

It is apparent that knowledge of the Union's organizing campaign, while not universal, was nevertheless widespread throughout the managerial ranks. It would be inappropriate to conclude on this basis that supervisors also had specific knowledge of LoManto's involvement in that campaign. Each of the supervisors testified that they were completely unaware of his participation at all times under consideration. The Company employs 800 dealers. Two hundred of them were involved in the organizing campaign at least to the extent of signing authorization cards. Others were more active participants. Unlike cases involving small companies, it is impossible to draw an inference of specific knowledge based merely on the supervisors' awareness of the overall union campaign being conducted among members of this large work force. [42]

As direct evidence on the key point of specific knowledge of LoManto's role in the organizing effort, the General Counsel offered only his testimony. In that testimony, he claimed that Evans and Niceta witnessed his involvement in distribution of union literature in the dealers' lounge. He also contended that Niceta and Nebbett both spoke to him about his involvement in protected activities. In sharp contrast, each of those managers testified that they were completely unaware of LoManto's participation in union organizing. Evans and Niceta denied seeing LoManto with union literature in the lounge. Niceta and Nebbett denied speaking to LoManto about his union activities or interests. I have weighed LoManto's highly self-serving account against the denials of each of the persons he accuses of misbehavior growing out of knowledge of his union activities. I credit Evans, Niceta, and Nebbett in all respects. As a result, there is no direct evidence that management knew of the nature or extent of LoManto's union sympathies or activities.

Turning to the Board's analytical tools for assessing whether sufficient circumstantial evidence exists to support a finding of employer knowledge, I will begin by examining the timing of the events at issue. The disciplinary actions taken against LoManto, starting with the initiation of an investigation of the February 21 incident, all took place in late February and March. This coincides with the final weeks of the Union's organizing campaign. In appropriate cases, this confluence of key events could properly support an inference of employer knowledge of an alleged discriminatee's union activities. *Montgomery Ward & Co.,* 316 NLRB 1248, 1253 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). Such is emphatically not the case here. In order to draw such an inference, I would have to find that the Company imposed some control over the sequence of events by, for example, contriving to punish LoManto for pretextual infractions raised as mere smokescreens designed to defend against allegations of unlawful discrimination.

The evidence clearly establishes that the Company did not select the timing and

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(Stipulation of December 28, 2004, p. 2.) Since the Company's handbook limits solicitation to nonworking time and prohibits solicitation in work areas, this investigation appears to be a legitimate attempt to verify compliance with company rules. (Handbook at p. 15, GC Exh. 14.)

[42] Counsel for the General Counsel correctly notes that Niceta testified that several employees complained to him regarding aspects of the Union's organizing campaign. From this, he argues, "it is highly probable that Niceta learned of LoManto's support for the Union." (GC Br. at p. 33.) The Union was attempting to organize a group of 800 dealers. Two hundred of them signed authorization cards. The evidence established that, in addition to LoManto, other dealers were actively involved in the campaign. Given the size of the work force and the quantum of support for the Union, the fact that Niceta received a few complaints does not establish any knowledge regarding LoManto's involvement. I accept Niceta's credible testimony to the contrary.

sequence of the events in this case. Ossakow, Thrower, and Milano chose to visit the casino on February 21. It was this decision by the casino's customers that determined the timing of the incident that occurred on that day. By the same token, Adams, Costello, and Kelly chose to gamble at the casino on March 5. It was these decisions taken by independent actors that set the stage for the disciplinary actions that followed. Furthermore, it was LoManto's conduct on those occasions that prompted the customers to lodge complaints.

The Board has repeatedly cautioned against drawing an inference of knowledge or animus based on such events. In a recent example, the Board observed,

> [w]hile the employees' union activities and the discharges did occur within a relatively brief period, so, too, was there a close proximity in time between the employees blatant misconduct and the Respondent's decision to terminate them. Under these circumstances, the factor of timing is too weak a foundation upon which to base a finding of pretext.

Syracuse Scenery & Stage Lighting Co., 342 NLRB No. 65 (2004), slip op. at p. 4. This is particularly true here since the key events were triggered by persons who had no association with the employer. Sometimes a coincidence is simply a coincidence. As the Board has noted, "coincidence, at best, raises a suspicion. However, 'mere suspicion cannot substitute for proof.'" *Frierson Bldg. Supply Co.,* 328 NLRB 1023, 1024 (1999) [Citation omitted.] I, therefore, accord no probative weight to the timing of the events at issue.

Another circumstantial factor to be considered is the quality of the employer's investigation of allegations of misconduct, including the reasons asserted for launching such an inquiry. It is evident that the investigations in this case were primarily undertaken in response to customer complaints. As to the February 21 incident, it is virtually inconceivable that an employer engaged in a customer oriented business would fail to investigate a complaint by multiple patrons that was so strongly felt that each individual prepared his own written report about it in addition to making oral protestations to various supervisors. Similarly, I find nothing suspicious in management's decision to investigate the March 5 incident, given that oral complaints from customers were coupled with written reports from the supervisors present on the floor indicating that they witnessed key aspects of LoManto's alleged misbehavior. The Company's decisions to investigate these incidents raise no suspicion whatsoever.

The quality of an employer's investigation of alleged misconduct is also a significant circumstantial factor in assessing allegations of illegality. *Rood Trucking Co., Inc.,* 342 NLRB No. 88 (2004). In this case, I was highly impressed by the manner in which the Company's officials assessed the allegations against LoManto. To begin with, the Company maintained and followed a policy of securing written statements from all parties involved in an alleged incident. Indeed, reporting forms were kept on the casino floor so that they would be readily available for this purpose. The compilation of written statements is a hallmark investigatory technique employed by professional investigators. For example, it is the technique chosen by the General Counsel when gathering evidence regarding alleged unfair labor practices.[43] It is

[43] The *NLRB Casehandling Manual, Part One—Unfair Labor Practice Proceedings,* Section 10060, observes that written affidavits are "the preferred method of taking evidence from witnesses" and represent the "keystone" of an investigation because, "they set forth exactly what each witness recalls and provide a permanent record of the testimony, which can be relied upon in making a decision regarding the case."

recognized as a particularly effective method because it forces witnesses to reflect on the events while choosing their descriptive words. In addition, it impresses those informants with the seriousness of the investigation and, by documenting their assertions in permanent form, signals that the report writers will be held to account for the veracity and consistency of their statements. Finally, the compilation of witnesses' accounts in the form of documents permits the decision makers to study the record and reflect prior to reaching final conclusions. I find the Company's investigatory policy to be praiseworthy.

Not only did the Company have a policy in favor of written statements, it actively employed that policy with respect to LoManto. For example, when higher management discovered that there had been a failure to obtain a statement regarding the February 21 incident from LoManto's immediate supervisor, Krasowski, they insisted that one be procured. Far from striking me as irregular, this underscored the integrity of the disciplinary process employed. It manifested a desire to proceed with deliberation and to obtain a complete record before making any decisions. Included in that complete record was a written statement from the employee whose behavior was under examination. Indeed, LoManto testified that he was afforded two-and-one-half hours to write his account of the March 5 events. This certainly suggests that management wished to give him the opportunity to make a full written presentation of his side of the story.[44] All of these procedures were a far cry from any rush to judgment.

The same is true regarding the manner in which the Company employed a consensus approach to disciplinary decision making. I was impressed that three different decision makers were required to conduct independent reviews of the record and formulate individual opinions. Only then did final group discussions occur. The resulting decisions were the product of give-and-take and compromise. This was well illustrated by the way in which the February 21 incident was resolved. Opinions varied from issuance of a written warning, a final written warning, or even termination. After careful discussion about the nature of the evidence of misconduct and particularized consideration of the employee's past employment history, a group decision was reached. That decision called for the imposition of the least strict of the three alternatives that were under consideration. Once again, the process employed in assessing both incidents was one that was well calculated to produce fair and reasonable results. And, in the manner in which management implemented that process with respect to LoManto, I conclude that such fair and reasonable results were obtained. I find nothing in the disciplinary process to suggest any impropriety and much in that process to indicate that LoManto's discipline was the product of carefully reasoned business judgments, free from any taint of illegality.

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[44] In assessing the quality of an investigation, the Board considers whether the employer afforded the employee an opportunity to explain his version of the events. *Hospital Espanol Auxillo Mutuo de Puerto Rico, Inc.,* 342 NLRB No. 40, slip op. at 3 (2004) (animus shown when employer accepted complaints as true without affording employee an opportunity to rebut them). As indicated, LoManto gave written accounts of his participation in both incidents and these were considered by management. In addition, during his series of meetings with Nebbett on March 5, LoManto was also given an opportunity to present an oral justification of his behavior. I find that the Company took appropriate measures to obtain LoManto's side of the story. See, *Washington Fruit and Produce Co.*, 343 NLRB No. 125 (2004), slip op. at 7, where the employee gave a written statement and the deciding official terminated the employee without conducting an oral interview. The Board characterized the employer's investigation as "thorough and complete."

Finally, it is necessary to evaluate the Company's disciplinary decisions within the context of the Company's established work rules and policies and its history of disciplinary actions against other similarly situated employees. Turning first to the consistency of the decisions involving LoManto compared with the Company's preexisting work rules and policies, I note that the stated reason for his written warning was inappropriate statements to customers, while the reasons given for his discharge were insubordination and misconduct toward customers. The record establishes that these grounds for discipline reflect well-established company policies. The Company's handbook, issued to LoManto on September 28, 2000, clearly states that "[i]nsubordination" and "[r]efusal or deliberate failure to perform work assignments" are prohibited forms of misconduct. (Handbook at p. 18, GC Exhs. 14 and 14(b).) Two supervisors reported that LoManto, while in their presence, refused to comply with direct orders to resume dealing and to refrain from talking to patrons. His discipline for this conduct was entirely consistent with the Company's preexisting written policies.

The Company's handbook takes great pains to emphasize the importance of proper conduct toward customers. In the introduction, a high corporate official advises employees that,

> [o]ur guests demand courteous and friendly service from all of our employees . . . . We rely on you every day to help us maintain the *Legacy of Excellence* we have created. [Italics in the original.]

(Handbook at p. 3, GC Exh. 14.) Later, the handbook sets forth the Company's "Courtesy Policy," noting that it is "in the hospitality business" and that it wanted every guest "to be treated with respect and understanding." (Handbook at p. 10, GC Exh. 14.) Finally, to underscore the importance of this concept, the list of disciplinary infractions includes, "[r]ude or discourteous behavior to a guest." (Handbook at p. 18, GC Exh. 14.)

The Company's message to employees regarding customer relations was reinforced in printed comments contained in the annual evaluation forms issued to its staff. For example, in August 2002, the employees, including LoManto, were reminded "not [to] lose sight of the significance of extraordinary customer service." In particular, they were enjoined to "[r]emember to avoid crossfire—enjoy the company of your players instead." (GC Exh. 5.) Similarly, in June 2003, the employees, again including LoManto, were counseled regarding the importance of their "demeanor" and advised to "[c]ome to work prepared to be an Entertainer." (GC Exh. 4.)

As may well be expected of a customer service enterprise engaged in a highly competitive field, management stressed the importance of good customer relations.[45] LoManto's behavior on February 21 and March 5 represented precisely the type of "crossfire" that management instructed its employees to avoid. The decision to terminate a dealer who, in the space of less than two weeks, caused two separate groups of customers to become angry enough to register vociferous complaints strikes me as entirely consistent with the Company's emphatic policies regarding customer relations. It does not support any inference of impropriety.

I also find that the Company's actions toward LoManto were generally consistent with its previously articulated disciplinary philosophy. That philosophy was succinctly expressed in the Company's handbook. This noted that the Company "usually" employed "progressive discipline"

[45] As to the competitiveness of the marketplace, Yeoman testified that the Union either represented employees or engaged in organizing activities involving eight casinos in Atlantic City.

which it clearly and simply defined as "warning letters before termination." (GC Exh. 14, pp. 16-17.) I recognize that, in this case, the Company issued its warning letter to LoManto on the same day that he was placed on the suspension that ultimately ripened into his discharge. As a result, he never had the opportunity to demonstrate his response to the written warning. The reason for this compressed sequence of events was LoManto's poor behavior toward customers on March 5. I find that management intended to afford LoManto the benefit of the progressive policy. The language of the written warning that had been prepared prior to March 5 reflects this desire. In classic words completely consistent with principles of progressive discipline, it plainly warns LoManto that future incidents of similar misconduct may result in his discharge.

LoManto's own actions on March 5 nullified the cautionary intention underlying the warning by precipitating his suspension on the day he was issued the letter. I conclude that the Company's officials manifested an intention to comply with the disciplinary philosophy. The inability to completely comply with that philosophy was caused by LoManto. Given the changed circumstances, the decision to proceed with termination fit within the exception to the progressive policy outlined in the handbook. In any event, I note that the essential purpose of the progressive concept of discipline was fulfilled in this case. On February 21, LoManto became involved in an incident resulting in customer complaints. His supervisor removed him from the table and told the customers that he wished to make them happy. When LoManto returned to duty, the supervisor required him to prepare a written incident report. I conclude that he had every reason to believe that his conduct regarding customers was now under scrutiny. Furthermore, the evidence shows that he did in fact reach this conclusion. Both he and Krasowski testified that they had a conversation about the February 21 incident several days later. It was apparent from that discussion that LoManto was concerned about management's response to the allegations of improper behavior.[46]

Because the Company's actions had placed LoManto on notice that his behavior toward customers was under examination, the basic purposes of the progressive system of discipline had been fulfilled. Although having been placed on notice regarding the issue of customer service, LoManto chose to again become involved in an unpleasant interaction with a group of patrons. The expectation that imposition of progressive measures of discipline would obtain improved performance was demonstrated to be in vain. In sum, I conclude that the Company's conduct toward LoManto was consistent with its preexisting disciplinary procedures and philosophy. It does not provide any circumstantial evidence of knowledge of union activity or unlawful discriminatory intent.

I must next determine whether disparities exist between LoManto's treatment and the treatment of other employees in comparable situations. The parties have invested particular energy in addressing this question, submitting numerous personnel records to support their respective contentions. In what is perhaps a good illustration of the ambiguities involved in making these comparisons, I note that files regarding several employees were submitted as evidence offered in support of both counsel for the General Counsel and counsel for the

[46] Indeed, if one were to credit LoManto's account of this conversation, he was given even more reason for such concern. He claims that Krasowski warned him that management appeared to be trying to get him into trouble. In fact, I do not credit his version, finding Krasowski's account to be more reliable. Under that version, he initiated the conversation seeking to learn the status of the investigation of the incident. This is certainly evidence that he was aware that the quality of his behavior toward customers was being examined. As Evans put it, "he must have known, because he was requested to write the statement, that there was a problem." (Tr. 632.)

Respondent's positions as to this issue. I also note that caution must be employed in comparing the detailed record developed in this case regarding the full picture of the circumstances involved in LoManto's discipline with the limited information that can be gleaned from employment files regarding the other disciplined employees. Finally, I have excluded a number of counsel for the Respondent's assertedly similar situations from consideration for two reasons. Two of those employees were actually supervisors. No evidence was presented indicating that supervisory employees are subject to the same disciplinary rules and procedures as nonsupervisory staff. Absent such evidence, I decline to make such an assumption. It would be entirely reasonable for an employer to hold supervisors to a higher standard. As a result, it is inappropriate to include such cases in my analysis. Additionally, the Company has submitted a number of records involving discipline imposed after the events in this case took place. Disciplinary decisions made after LoManto's discharge do not shed light on the Company's procedures as they existed at the critical time under assessment.

Turning now to the relevant records, it is necessary to begin by considering LoManto's situation. He was assertedly discharged based on conduct involved in two incidents occurring less than two weeks apart. The first incident concerned poor customer relations. The second incident involved both poor customer relations and two separate instances of insubordinate conduct toward two different supervisors. Counsel for the General Counsel correctly notes that LoManto had no prior history of formal discipline. In addition, he had received satisfactory yearly performance evaluations.[47] He also received a number of commendatory points awarded under the Company's recognition program and a letter of appreciation from customers.

This positive evidence regarding LoManto's job performance prior to the incidents at issue is somewhat offset by consideration of other evidence indicating a decline in his performance. There was credible evidence that LoManto's supervisors were concerned about his customer relation skills prior to February 21. His immediate supervisor, Krasowski, testified that he had received verbal counseling. Under cross-examination by LoManto, Krasowski was asked about her general opinion of his customer relation skills. She testified that it had been her observation that he had a "very bossy, very lecturing" demeanor that adversely affected customers' enjoyment of their gambling experience. (Tr. 411.) Krasowski's opinion was supported by the comment of Supervisor Pilleggi in his report regarding the February 21 incident. He concluded that report by making note that,

> [t]his seems to be an ongoing problem with Mr. LoManto and should be dealt with in a stern fashion.

(CP Exh. 4.) LoManto also examined Nebbett regarding his employment history, including the comment made by Pilleggi. Nebbett responded that, while LoManto had no instances of written discipline, "[t]here was, indeed, sentiment among some of the Managers that he had a habit of behaving this way." (Tr. 587.)

In my view, a full assessment of LoManto's history prior to February 21 indicates that he had a good employment record, but was experiencing some deficiencies in job performance related to customer service issues. He had been given verbal counseling about this and his supervisors continued to view it as a concern.

I must now compare the discipline of this employee for poor customer relations and

[47] In each of these evaluations, he was rated as "effective." (GC Exhs. 4, 5, 6, and 7.) The Company uses a pass/fail system with only two categories, effective and ineffective.

insubordination with records regarding comparable cases. The General Counsel first cites the situation of Joe C.[48] (GC Exh. 45.) He was issued a suspension and final warning for abandoning his post. Very shortly thereafter, he engaged in a second incident of misconduct involving the making of an improper gambling decision that cost the casino money. Although he had been given a final warning very shortly before the second incident, he was merely issued another written warning for that event. I do not find this particularly probative. The incidents did not involve customer service. In addition, the employee explained that he abandoned his post due to problems with medications recently prescribed for his anxiety and depression. I do not find anything suspicious when comparing his treatment to that of LoManto.

The General Counsel also cites the case of Michael M. (GC Exh. 29 and R. Exh. 17.) He was terminated in May 2003. However, he had a number of prior disciplinary problems, including a history of inappropriate comments to supervisors, sleeping on the job, and absenteeism. While he may have been extended more consideration than LoManto, I note that he was not accused of inappropriate interactions with customers. Importantly, the record reflects concerns about his mental health, including supervisory reports of his manic behavior. It also reflects that the ultimate cause of his termination was for failure to attend unspecified weekly sessions that may have been required therapy. I do not find any compelling similarities to the case under consideration.

Counsel for the General Counsel also raises the discipline of Michael C. (GC Exh. 26. and R. Exh. 12.) He received only a final warning for inappropriate conduct toward a customer. However, the records indicate that, "[w]hile Michael did not say anything inappropriate to the customer, his tone of voice was unacceptable." (GC Exh. 26(b).) His offense was characterized as "[f]ailure to remain calm under adverse conditions." (GC Exh. 26(f).) At least regarding the February 21 incident, LoManto's conduct was clearly worse. He not only used an unacceptable tone of voice, but he also called a patron a cheater. Less than two weeks later, he again became involved in a customer relations incident and became insubordinate. Both his conduct and management's responses were more severe than that involved with Michael C.

Both sides cite the case of Pablo T. (GC Exhs. 24, 25, 42 and R. Exh. 22.) I can understand why. He was terminated in September 2003 for insubordination, consisting of his refusal to follow the dealing instructions of his immediate supervisor. This mirrors the insubordinate refusal of LoManto to resume dealing and to refrain from discussing the matter with customers. However, it is also true that this employee appears to have been given more opportunities under the progressive disciplinary system. He had persistent disputes with customers regarding second-hand cigarette smoke and was warned about this issue and about rudeness. However, despite being offered the opportunity to file written reports, his customers declined. The best that can be said about this case is that it provides some limited support to both sides.

Both sides also cited the case of Tommy C. (GC Exhs. 27, 28 and R. Exh. 10.) He was given a final warning in July 2003 for elbowing a fellow employee. He was terminated in February 2004 due to two episodes, one involving his yelling at a coworker and the other concerning a customer complaint. Interestingly, he also refused to prepare an incident report regarding that customer complaint. I find that his discipline is quite consistent with that imposed on LoManto. He was issued a warning for an interpersonal dispute. While that dispute was

[48] I will use initials to identify these employees. They are not involved in this litigation and the files contain private, and potentially embarrassing, information about them. I see no need to identify them in this public document.

more serious than LoManto's because it involved violence, it was not directed at a casino customer. In any event, his discharge resulted from a combination of interpersonal problems, including those involving a customer, and insubordination. Having committed much the same offenses as LoManto, he was subjected to the same disciplinary sanction.

The Company cites the case of Diane R. (R. Exh. 21.) She was terminated in March 2002 for inappropriate interaction with a patron and insubordination. Thus, her discipline was entirely consistent with that meted out to LoManto. I note that she had a prior disciplinary history of absenteeism. I do not consider this factor to be significant. Review of the personnel records submitted by both sides demonstrates that the Company showed considerable tolerance for attendance problems.

The Company also directs attention to the discipline imposed on Holly P. (R. Exh. 19.) She was issued a final warning for insubordination in June 2000 due to making an inappropriate remark to a supervisor while in the presence of customers. The sparseness of this particular personnel record does not permit me to make any strong conclusion regarding this episode, apart from noting that the Company takes insubordination seriously.

A more interesting comparison involves the cases of John N. and Walter J. (R. Exhs. 14 and 18.) These two employees were both terminated in May 2003 for arguing with each other in front of patrons. Natello had recommended suspensions, but the ultimate decisions were for terminations. John N. had no recent history of discipline except for absenteeism. As to that, there was some brief indication in the file that he suffered from an unspecified health problem. Walter J. also had no recent performance related discipline. The termination of these employees appears to have been based on a stricter application of the disciplinary policy than that afforded to LoManto.

All in all, while one could certainly split hairs in closely evaluating the Company's past behavior, I do not find any persuasive evidence that LoManto was subject to disparate treatment. In reaching this conclusion, I note two pertinent observations by the Board. In *Merillat Industries, Inc.,* 307 NLRB 1301, 1303 (1992), the Board recognized that, "it is rare to find cases of previous discipline that are 'on all fours' with the case in question." This fact should not be permitted to defeat an employer's claim that it did not engage in disparate treatment.[49] When viewing disciplinary records for purposes of comparison, the Board also advised that a "Respondent's defense does not fail simply because not all the evidence supports it, or even because some of the evidence tends to negate it." 307 NLRB at 1303. In this case, I find that the preponderance of the evidence on the issue of disparate treatment supports the Company's position that LoManto's discipline was generally consistent with that imposed on other employees in similar situations.

I have carefully considered all of the analytical tools for assessment of circumstantial evidence as outlined by the Board.[50] They do not provide sufficient basis for concluding that the

[49] See also, the Board's very recent discussion regarding evidence of disparate treatment in *Framan Mechanical, Inc.,* 343 NLRB No. 53 (2004), slip op. at 9-10.

[50] The Board provided a comprehensive list of the factors that should be employed in evaluating circumstantial evidence of knowledge of union activity in *Montgomery Ward & Co.,* 316 NLRB 1248, 1253-1255 (1995), enfd. 97 F.3d 1448 (4th Cir. 1996). In addition to those already discussed, the Board also mentioned any delay in imposing discipline and evidence that multiple union supporters were simultaneously discharged. I conclude that the small delay in issuing LoManto's written warning was satisfactorily explained by reference to Evans'

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disciplinary actions taken against LoManto in February or March were influenced in any degree by knowledge of his protected activities. To the contrary, I conclude that the preponderance of credible evidence establishes that the supervisors who participated in the disciplinary process were unaware of LoManto's involvement in such activities. Based on this conclusion, it follows that the General Counsel has failed to meet his initial burden of proof under *Wright Line.* See, *Tomatek, Inc.*, 333 NLRB 1350, 1356 (2001) (axiomatic that employer could not have been unlawfully motivated if it was unaware of protected activity.)

In the interest of decisional completeness, I will make brief comments on the evidence regarding subsequent steps in the evaluation process. In order to meet his initial burden, the General Counsel must also demonstrate that unlawful animus was a motivating factor in the decisions to warn, suspend, and terminate LoManto. Once again, the only direct evidence of such animus was LoManto's unsupported testimony. I have rejected it, finding the contrary accounts of numerous supervisors to be consistent and reliable. As to circumstantial evidence of animus, the evaluative process is essentially identical to that employed in assessing the element of knowledge. For the reasons discussed in detail regarding such evidence of knowledge, I conclude that the General Counsel has failed to meet his burden of showing that the Company was motivated, to any extent, by unlawful animus against LoManto's protected activities. At best, the circumstantial evidence consists of "suspicion, surmise, and conjecture," factors the Board has precluded as appropriate elements to support a finding of animus. *Cardinal Home Products, Inc.,* 338 NLRB 1004, 1010 (2003).

Lastly, I note that, although the employer's defense to allegations of unlawful discrimination is not reached in this case since the General Counsel failed to meet his initial burden, it has been necessary to evaluate the essence of that defense in considering the circumstantial evidence of knowledge and animus. For reasons already discussed, I have concluded that the employer's evidence shows that LoManto was afforded a reasoned, deliberative, and appropriate disciplinary process, the very process mandated by the Company's procedures and past practices. Based on the totality of the evidence, including the credible testimony of the managers and supervisors involved, I find that, even if one were to assume knowledge and animus, the Company would have imposed the same discipline. I conclude that the Company, being engaged in a competitive customer service business, would have discharged any employee who, twice within the space of two weeks, caused groups of customers to become irate, and who twice refused to comply with direct orders issued by two different supervisors. This combination of serious offenses was the cause of LoManto's discipline.

In reaching this ultimate outcome, I am mindful that the record disclosed a genuine difference in viewpoint as to the role of the casino's dealers. LoManto maintained a firm belief that the primary duty of a dealer was to enforce the casino's rules so as to assure the integrity of the games of chance.[51] The uniformly expressed view of the Casino's managers, a group that

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unavailability during the period immediately after February 21 because she was on vacation. As to multiple discriminatees, this factor points against knowledge or animus since LoManto was the only employee out of the 800 dealers who was allegedly disciplined for organizing activity.

[51] Interestingly, LoManto recognized that he stood rather alone in his opinion. He repeatedly commented to supervisors and patrons that he was the only dealer who enforced the rules. The evidence showed that customers shared his perception in this regard, often expressing surprise at the manner in which he attempted to do so when compared to their experiences with other dealers.

had many years of experience as dealers and floor supervisors, was to the contrary.[52] They held that the principal duty of the dealers was to furnish the customers with an enjoyable entertainment experience so as to create a desire to return for more of the same. Certainly, I conclude that both philosophies are reasonable.[53] The difficulty for LoManto was that he was unable or unwilling to conform his conduct to meet the casino's priorities. In fact, he appeared incapable of understanding the casino's rather nuanced view. This was evident during his cross-examination of Pit Boss Solomon regarding the propriety of a customer receiving a chip from a friend in order to place a bet. Solomon opined that if this happened once, it would be "acceptable." (Tr. 487.) LoManto responded,

> LOMANTO: Does it matter if it's one bet?
>
> SOLOMON: One bet is acceptable.
>
> LOMANTO: Isn't a rule a rule?
>
> SOLOMON: I mean it's not a black and white area, it's a gray area.

(Tr. 487.) In fact, LoManto was perplexed by the management philosophy even when it was offered in his own behalf. This was illustrated by an exchange that occurred during LoManto's cross-examination of Vice President of Casino Operations Niceta:

> LOMANTO: Did you have a problem with my sideburns?
>
> NICETA: They were illegal, but they were okay.
>
> LOMANTO: I'm sorry?

(Tr. 739.) As the court reporter's correct choice of punctuation for LoManto's response to Niceta's statement indicates, this was an expression incomprehension, not contrition.

Of course, the point of all this is that in a dispute over priorities and philosophies between an employer and an employee, it is management's prerogative to insist on employee conduct that conforms to its viewpoint. As the Board has recently stressed, in circumstances where there is no proof of discriminatory intent,

> we emphasize at the outset that "the crucial factor is not whether the business reason cited by [the employer was] good or bad, but whether [it was] honestly invoked and [was], in fact, the cause of the change. Further, in making this determination, it is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful. [Citations omitted.]

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[52] This is not to suggest that the managers were unconcerned with rule infractions. Counsel for the General Counsel closely questioned Nebbett on this subject. Nebbett acknowledged that dealers are supposed to enforce rules, but "[d]elivery is everything." (Tr. 550.)

[53] Indeed, as a judge, I am sympathetic by nature regarding LoManto's desire to see people play by the rules.

Framan Mechanical Inc., 343 NLRB No. 53 (2004), slip op. at pp. 4-5. Because LoManto failed to conform his behavior to the employer's requirements resulting in both customer dissatisfaction and insubordinate conduct, the employer's decision to terminate him for such misconduct was not unlawful.

Conclusion of Law

The Company did not violate the Act in any of the ways alleged by the General Counsel in the complaint and notice of hearing dated May 25, 2004.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[54]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. March 29, 2002

Paul Buxbaum
Administrative Law Judge

[54] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.